Supreme Court, U.S.
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No. 01-1560

In The
Supreme Court of the United States

PABLO E. BARRIOS,

Petitioner,

v.

THE FLORIDA BOARD OF REGENTS
and JESSE L. CAMPBELL, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In framing the questions presented for review here, Petitioner asserts that the reassignment to a different job involved "different conditions of employment". That is Petitioner's allegation and not the finding of the District Court. The District Court decision explains that Petitioner did not establish that his transfer altered the terms, conditions and privileges of employment. Respondents therefore find it necessary to restate here the questions presented by Petitioner neutrally, and combined as one, as follows:

1. Whether a transfer from the investigations unit to the patrol unit which requires the officer to sometimes work different hours and have different days off, to wear a uniform and decreased his clothing allowance, to sometimes work in the patrol car, and to work with "commoners" instead of dignitaries, but does not alter the officer's rank, compensation or benefits, sufficiently impacts the terms, conditions, or privileges of employment so as to constitute an adverse employment action to support a claim for retaliation against his employer and a claim of free speech retaliation against his supervisor?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties to this case. None of the parties to this case is a corporate entity. Therefore, there is no parent corporation, or publicly held company owning 10% or more of stock.

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Supreme Court Rule 10 1

Title VII of the Civil Rights Act of 1964 ..... *passim*

OPINIONS BELOW

The opinion of the court of appeals in *Barrios v. Florida Board of Regents* issued on January 16, 2002 is an unpublished decision affirming the District Court decision. *Barrios v. Florida Board of Regents*, 2002 U.S. App. LEXIS 5919 (11th Cir. 2002). [Pet. App. 1].[1] The opinion and order of the District Court are unreported. [Pet. App. 2-20].

BASIS FOR JURISDICTION

This Court may only exercise discretionary jurisdiction over a decision of a circuit court of appeals that conflicts with the decision of another circuit court of appeals on the same important matter, that decides an important question of federal law that has not been, but should be, settled by this Court, or that decides an important federal question in a way that conflicts with relevant decisions of this Court. 28 U.S.C. §1254(1); Supreme Court Rule 10. Additionally, this Court can decline to exercise its jurisdiction in cases that are not sufficiently important to warrant review. *In re: Woods*, 143 U.S. 202, 36 L. Ed. 125, 12 S. Ct. 417 (1892).

STATEMENT OF THE CASE

Petitioner seeks review of an unpublished Florida court of appeals decision, which affirmed the trial court's

[1] "Pet. App." refers to the Appendix filed by the Petitioner with his Petition for Writ of Certiorari and will be followed by the appropriate page number of the document.

decision granting summary judgment in favor of the Florida Board of Regents ("Board of Regents") on his claim of retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §2000e, *et seq*. ("Title VII") and in favor of Chief Jesse L. Campbell on his free speech retaliation claim pursuant to 42 U.S.C. §1983. Petitioner does not seek review of the portions of the District Court decision granting of summary judgment on his other claims. [Petition p. 3, 9, 11].

A. District Court Decision Granting Summary Judgment.

In his brief, Petitioner fails to present this Court with several facts considered by the District Court in determining whether Petitioner suffered an adverse employment action. Petitioner relies solely on the job transfer. In fact, Petitioner states that he will ignore the additional facts referred to by the District Court. [Petition p. 5]. The full analysis of the District Court is important.

On July 11, 2001, the District Court granted the motion for summary judgment on all counts. [Pet. App. 2-20]. In support of his argument that he suffered an adverse employment action, Petitioner relied on his transfer from the investigations unit to the patrol unit. The District Court reviewed the record and found that Petitioner was subjected to the following conduct as a result of the filing of the internal grievance in June 1998 and the EEOC complaints on May 27, 1999 and April 22, 2000: July 1998 transfer to the patrol unit; threats that he would lose the assistance of other officers in completing his investigative work; being called "old" and a "fat ass";

being subjected to inspections of his work; being questioned by Campbell about his grievance; and two internal affairs investigations. [*Id.* at 5, 10].

The District Court then analyzed each of these conducts in light of the standards enunciated in *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1239 (11th Cir. 2001) (employment action must objectively, not subjectively, "impact the 'terms conditions, or privileges' of the plaintiff's job in a real and demonstrable way" and have "at least a tangible adverse effect on the plaintiff's employment" to constitute an adverse action). [Pet. App. 10-11]. After applying these standards, the court determined that only two of the actions taken against Petitioner, the two internal affairs investigations and the transfer to the patrol unit, warranted further analysis. [*Id.* at 11].

With respect to the two internal affairs investigations, the court found that the record was devoid of any evidence that the investigations or their findings that the charges were "not sustained" had any impact on Petitioner's employment. [*Id.* at 11]. Moreover, the investigations were not initiated by any person with knowledge of the internal grievance or charges of discrimination. [*Id.* at 12].

With respect to the 1998 transfer, the court reviewed Petitioner's declaration. [Pet. App. 12-13, 21-23]. Petitioner asserted that the transfer required him to work rotating shifts, which included weekends rather than working mostly Monday through Friday from 9 a.m. to 5 p.m.; required him to wear a uniform rather than plain clothes; required him to work out of a patrol car rather than an office; required him to work with commoners rather than with dignitaries; and decreased his clothing allowance. [*Id.* at 12-13, 21]. However, the court concluded

that none of these circumstances, viewed individually or collectively, constitute a serious or material change in the terms or conditions of Petitioner's employment. [*Id.* at 13]. In fact, Petitioner did not establish that the transfer resulted in any tangible change to his compensation, benefits, rank or job duties. [*Id.*]. Petitioner failed to present evidence sufficient to establish that the change in his schedule may have altered the "terms, conditions, or privileges" of his employment. [*Id.*]. There was no evidence of a demotion or increased work hours. [*Id.*]. Thus, the District Court found that Petitioner failed to establish that any adverse employment action was taken in retaliation for his filing of the internal grievance or the EEOC charges. [*Id.* at 10, 13-14].

Additionally, the district found that Petitioner failed to demonstrate that he was retaliated against for exercising his First Amendment Rights. [*Id.* at 16]. First, the court pointed out that in support of his argument that he was denied his right to speak to his friends about matters that were purely personal to Petitioner. [*Id.* at 15]. Additionally, the court noted that, although not referred to by Petitioner himself, the record does contain evidence that Petitioner complained that Hispanic officers were not paid adequately for the work they performed and that Hispanics were not being promoted to the higher ranks. [*Id.* at 15].

In support of the retaliation for these complaints, Petitioner relied upon his transfer to the patrol unit. [*Id.* at 15-16]. The court found that Petitioner failed to establish an adverse employment action, an essential element to establish a First Amendment retaliation claim. [*Id.* at 16]. Accordingly, Petitioner failed to establish that he was

retaliated against for exercising his First Amendment rights.

B. The Court of Appeals' Affirmance of the Summary Judgment.

On January 16, 2002, the Eleventh Circuit issued its decision affirming the order granting the summary judgment motion for the reasons set forth in the District Court's order. [Pet. App. 1].

SUMMARY OF ARGUMENT

Petitioner's Writ of Certiorari should be denied. This case is not suitable for further review for several reasons. The District Court applied the appropriate standard for what constitutes an adverse employment action under Title VII's retaliation provision and for reviewing summary judgment motions. In fact, the propriety of the elements to establish a claim of retaliation are not before this Court. In this case, the germane facts are not in dispute. The court did not decide any factual issues. Petitioner did not create any issue of fact. He simply produced insufficient evidence to establish that he suffered an adverse employment action as a result of his transfer.

Next, there is no true conflict between the Third Circuit's decision in *Hampton v. Borough of Tinton Falls Police Dept.*, 98 F.3d 107 (3d Cir. 1996) and the Eleventh Circuit's decision. The law in the Eleventh and Third Circuit Courts of Appeals is consistent. The asserted conflict in the appellate decisions arose from differences in presentation of facts, and not in the application of a principle of law. In *Hampton*, the Third Circuit simply

reversed the summary judgment entered against the defendants on the disparate treatment and retaliation claims finding that the facts presented by the plaintiff created a jury question.

Further, the District Court's decision is not in conflict with other federal court of appeals decisions on the issue in this case. The law is clear, that a transfer, even without loss of pay or benefits, may, in some circumstances, constitute an adverse job action. In Petitioner's case, however, he failed to establish the existence of a material fact regarding whether he suffered an adverse change in the terms and conditions of his employment. Since Petitioner was unable to establish the second element of the prima facie case of retaliation, the Court properly granted Respondents' Motions For Summary Judgment.

Moreover, the District Court's decision is consistent with this Court's rulings regarding Title VII retaliation claims. Petitioner argues that the District Court's decision appears to conflict with this Court's decision in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), *superseded by statute as stated in, Brotherhood of Maintenance of Way Employees v. Guilford Transp. Industries, Inc.*, 803 F.2d 1228 (1st Cir. 1986). However, that case addresses different issues from the case at bar. Therefore, Petitioner's reliance on that case is misplaced.

Finally, this case does not have far-reaching employment law implications. There is nothing unique about the District Court's review of the evidence presented by Petitioner. Thus, the question presented by this case is of importance only to the litigants and does not present an

issue of immediate public significance. Thus, this Court should deny Petitioner's request for a writ of certiorari.

ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioner argues that the District Court's decision directly conflicts with the decision of the Third Circuit in *Hampton v. Borough of Tinton Falls Police Dept.*, 98 F.3d at 107 and with the reasoning of this Court in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. at 691. Both contentions are incorrect.

I.

THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH AND THIRD CIRCUITS ARE NOT CONFLICTED REGARDING THE STANDARD FOR EMPLOYER LIABILITY FOR RETALIATION.

This Court should leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of adversity and materiality of the employment conditions alleged. This Court has stated that it will not grant the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 422 (1923); *Rice v. Sioux City Memorial Park*

Cemetery, Inc., 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955).

This Court should only grant certiorari to review decisions of the United States Court of Appeals where the decision presents conflict with the uniform course of decisions previously made on the same question by other Courts of Appeals, *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 8 L. Ed. 2d 39, 82 S. Ct. 913 (1962), and to review the judgment of United States Court of Appeals where it is contrary to a decision of the Court of Appeals for another circuit, and there is a need for uniform rule on this point. *Commissioner v. Bilder*, 369 U.S. 499, 8 L. Ed. 2d 65, 82 S. Ct. 881 (1962). Neither of these circumstances is present in the instant case. Petitioner's writ of certiorari should be denied where asserted conflict in decisions arose from "differences in states of fact, and not in the application of a principle of law." *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813, 75 L. Ed. 728, 51 S. Ct. 214 (1931).

A. The District Court Used The Proper Framework To Analyze Retaliation Claims.

Although the general framework under which Petitioner's claim of retaliation was evaluated is not in dispute,[2] Petitioner disagrees with the District Court's

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[2] The general framework for proving a case of retaliation under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and similar federal statutes has long been settled. *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997); *Durley v. APAC*, 236 F.3d 651 (11th Cir. 2000) (applying same test to ADA claim); *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (applying same test to Family and Medical Leave Act); *Wolf v. Coca-Cola*, 200 F.3d 1337 (11th Cir. 2000) (applying same test to Fair Labor Standards Act).

decision of what constitutes an adverse employment action sufficient to establish the second prong of the plaintiff's prima facie case. Petitioner also seems to be questioning the origin of the "adverse employment action" requirement. [Petition pp. 9-10].

Although the term "adverse employment action" is not contained in the language of the statute or the regulations,[3] all circuits require that to establish a prima facie case of retaliation an employee must establish that he or she has engaged in protected activity, suffered an adverse employment action, and established a causal link between the protected activity and the adverse employment action.

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[3] Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a).

Section 704(a) of Title VII provides protection against retaliation for two groups of employees: (1) those opposing discrimination proscribed by Title VII and (2) those participating in Title VII processes:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a).

Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 760 (2d Cir. 1998); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997); *Johnson v. United States Dep't of Health & Human Services*, 30 F.3d 45, 47 (6th Cir. 1994); *Knox v. Indiana*, 93 F.3d 1327, 1333 (7th Cir. 1996); *Coffman v. Tracker Marine, LP*, 141 F.3d 1241, 1245 (8th Cir. 1998); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 868 (9th Cir. 1996); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir 1993), *limited by*, *Harrison v. Eldy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991). That standard is well entrenched in the case law and stems from the analysis first articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) ("The complainant ... must carry the initial burden by showing ... (iii) that, despite his qualifications, he was rejected. . . . "); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action."); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an

employment decision was based on a discriminatory criterion illegal under the Act.").

Moreover, this Court has defined an adverse employment action as one which "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998). Therefore, based on this Court's definition of the term, extensive precedent, and, in light of Petitioner's failure to object to the elements analyzed by the District Court, the propriety of the elements to establish a claim of retaliation are not before this Court.

B. The District Court's Decision And Reasoning Are Consistent With Summary Judgment Law And Not Conflicting With Any Case Law.

In this case, the germane facts are not in dispute. The District Court used the correct summary judgment standard. The record did not present any factual issues. The court did not decide any factual issues. Petitioner simply produced insufficient evidence to establish that he suffered an adverse employment action as a result of his transfer. Because the question of adversity was properly resolved on summary judgment in this case because the question was not fairly contestable. *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996).

The District Court applied the appropriate standard for what constitutes an adverse employment action under Title VII's retaliation provision. The court reviewed the actions to determine whether those actions affected the

terms and conditions of Petitioner's employment. The standard is consistent with the textual mandates of the retaliation provision and the case law interpreting the requirement. This standard allows flexibility to adapt to different factual situations and those facts are analyzed on a case by case basis.

The District Court in this case found that Petitioner had failed to offer any evidence that his July 1998 transfer to the patrol unit affected the "terms, conditions, or benefits"[4] of his employment and granted summary judgment on Petitioner's retaliation claims. [Pet. App. 13-14, 16]. The District Court followed well-established, and unchallenged, case law setting forth the summary judgment standard. [*Id.* at 7-8].

The record reveals that Petitioner failed to make any showing at all that his transfer to the new position was an adverse employment action, other than advancing his own subjective views on the subject. *Davis v. Town of Lake Park*, 245 F.3d at 1239 (plaintiff's subjective view of the significance and adversity of the action is irrelevant). Petitioner did not dispute that the transfer did not change his job duties, rank, compensation or benefits. [*Id.* at 13]. Petitioner did not establish that the reassignment changed the location of his job. Petitioner did not present any evidence that his clothing allowance as a patrol officer was different than his clothing allowance as an investigator. [*Id.*]. Petitioner presented no evidence that the transfer was a demotion or that it required him to work more hours for the same amount of pay. [*Id.*]. In summary, Petitioner

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[4] Title VII bans discrimination in "terms, conditions, or privileges of employment."

failed to articulate how his transfer actions cause a change to the terms, conditions or privileges of his employment.

An adverse employment action is an indispensable element of a Title VII claim. Because Petitioner bore the burden of proof, it was incumbent on him to present some evidence showing why the transfer was adverse to him. Without some demonstration that there was a contestable issue of material fact in this regard, the trial court did not err in finding, as a matter of law, that Petitioner's retaliation claims must fail with regard to the transfer. Because Petitioner failed to produce any objective evidence that his transfer was an adverse employment action, he did not establish that a material issue of fact existed that would warrant a trial of his retaliation claims with regard to that transfer. Therefore, the District Court properly granted summary disposition to the Board of Regents on the Title VII claim for retaliation.

Without any adverse employment action, Petitioner cannot establish a First Amendment retaliation claim against Campbell under section 1983. *See, e.g., Merriweather v. Alabama Dept. of Public Safety*, 17 F. Supp. 2d 1260, 1279 (M. D. Ala. 1998). Therefore, for the same reasons as discussed above, the District Court properly concluded that Petitioner had failed to establish a freedom of speech retaliation claim against Campbell.

C. The District Court's Decision Is Not In Conflict with Third District's Decision In *Hampton* Or Other Third District Case Law.

Petitioner relies on one case from the Third District to argue that the District Court's decision conflicts with the decisional law of the Third District.

In *Hampton*, the Third Circuit simply reversed the summary judgment entered against the defendants on the disparate treatment and retaliation claims finding that the facts presented by the plaintiff created a jury question. 98 F.3d at 116. The court found that the "district court either ignored several discrepancies in the evaluation process, or failed to give all reasonable inferences arising therefrom [to the plaintiff]" with regard to the disparate impact claim. *Id.* at 113-15. With regard to the retaliation claim, the Third Circuit left for the jury questions whether defendant's "reassignment" of plaintiff was in fact a "transfer" or a "demotion" and whether the move was an "adverse employment decision." *Id.* The court did not discuss what the plaintiff must do to show that an employment action was adverse. *Id.* In light of the District Court's analysis in this case and the lack of any analysis in the *Hampton* case, there is no conflict between the decisions.

Moreover, the law in the Third Circuit is consistent with the law in the Eleventh Circuit. In the Third Circuit, as in the Eleventh Circuit, retaliatory conduct constitutes "adverse employment action" under Title VII only if it "alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect[s] his [or her] status as an employee.'" *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *see also Davis v. Town of Lake Park*, 245 F.3d at 1239-40, 1245. Both Circuits hold that a transfer or reassignment may satisfy the "adverse action" element of a retaliation claim. But more is needed than a bare allegation of a transfer or reassignment.

Both circuits require a material adverse change to the working conditions to constitute retaliation. The hird Circuit has incorporated the prevailing standard for discriminatory practices into the retaliation context, ruling that an employer reprisal must be "materially adverse" before it can give rise to a Title VII claim. *See Robinson v. City of Pittsburgh*, 120 F.3d at 1300-01. In the Third Circuit, the "retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Id.* at 1300. Further, as stated in *Nelson v. Upsala Coll.*, 51 F.3d 383, 389 (3d Cir. 1995), to overcome a summary judgment an employee must allege an adverse action that has an "impact on any employment relationship that [the employee] had, or might have in the future."

In *Robinson v. City of Pittsburgh*, the plaintiff alleged that she was subjected to the following acts of reprisal due to the filing of her EEOC complaint: restricted job duties, reassignment and subsequent failure to transfer her out of an assignment in which she was under the direct command of the alleged harasser, and the issuance of several unsubstantiated oral reprimands against her. 120 F.3d at 1300. The court found that this conduct did not give rise to a claim of retaliation. *Id.* The court reasoned that the actions described did not amount to "adverse employment action." *Id.* The conduct did not alter Plaintiff's "compensation, terms, conditions, or privileges of employment," deprives him or her of "employment opportunities," or "adversely affects his [or her] status as an employee." *Id.* The court held that the "adverse employment action" element of a retaliation plaintiff's prima facie case incorporates the same requirement that the retaliatory conduct

rise to the level of a violation of 42 U.S.C. §2000e-2(a)(1) or (2). *Id.* at 1300-01.

The fact that the Eleventh Circuit in *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1452 (11th Cir. 1998) cited to the Third Circuit's decision in *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3d Cir. 1994) as an example of a case where the plaintiff had created a material fact issue concerning whether his transfer was a discriminatory scheme indicates the similarity between the circuits. Both circuits have found that "not everything that makes an employee unhappy" qualifies as retaliation, for "otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" *Robinson v. City of Pittsburgh*, 120 F.3d at 1300 and *Doe v. Dekalb County Sch. Dist.*, 145 F.3d at 1449 (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d at 274).

D. The District Court's Decision Is Not In Conflict With Other Federal Courts Of Appeals Decisions On The Issue In This Case.

Courts have generally found an adverse employment action only when the circumstances involve a greater relative difference between the positions in question than that involved in this case.[5] *See, e.g., Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49 (1st Cir. 2000) (summary judgment affirmed because plaintiff could not demonstrate an adverse employment action that was taken against him

[5] These retaliation cases are not directly on point, but nevertheless are suggestive as to the circumstances under which a lateral transfer would be considered an adverse employment action.

sufficient to support a claim of constructive discharge, and he thus failed to meet the adverse employment action prong of age discrimination; superior made structural changes that affected plaintiff's job, but not his salary or rank); *Burger v. Central Apartment Mgmt., Inc.*, 168 F.3d 875, 879-80 (5th Cir. 1999) (Title VII retaliation; same job title, benefits, duties, and responsibilities; longer commute was insufficient to make transfer adverse, as was transfer to "a less secure (but otherwise similar) position"; also noting "the clear trend of authority in other circuits holding that a purely lateral transfer is not an adverse employment action") (internal quotation marks and citations omitted); *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998) (involuntary lateral transfer, without more, does not constitute an "adverse employment action" where the transfer merely increased the employee's commute and did not alter her salary, benefits, or elementary school teaching responsibilities); *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998) (§1983 retaliation; transfer to night shift; "Merely changing Benningfield's hours, without more, does not constitute an adverse employment action. A transfer may also constitute a demotion.") (citations omitted), *cert. denied*, 526 U.S. 1065, 143 L. Ed. 2d 543, 119 S. Ct. 1457 (1999); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d at 1450 ("[T]he clear trend of authority" in other circuits holding that "a purely lateral transfer is not an adverse employment action."); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (finding that transfer was not a demotion; transfer had same salary, benefits, seniority, and relative level of prestige); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (transfer that did not entail a loss of pay, benefits, duties, or prestige was not adverse action); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6

(9th Cir. 1994) (where employee "was not demoted or put in a worse job or given any additional responsibilities" it was questionable whether he had suffered an "adverse employment action."); *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (holding that a mere change in job responsibilities without a concomitant loss of salary or benefits was not an adverse employment action under the ADEA); *Collins v. State of Illinois*, 830 F.2d 692, 704 (7th Cir. 1987) (Title VII retaliation; "relegated to doing reference work instead of consulting"; no longer had private office, own phone, business cards, or listing in professional publications); *Caussade v. Brown*, 924 F. Supp. 693, 700 (D. Md. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997) (unpublished table opinion) (finding no adverse employment action where a nurse was reassigned to a different ward with similar duties and responsibilities and same title, grade, salary and benefits).

However, where the transfer is not purely lateral, that is, where the transfer is objectively equivalent to a demotion, courts in other circuits have recognized the transfer as an adverse action. *See de la Cruz v. New York City Human Resources Admin. Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (transfer to a less prestigious job with little opportunity for professional growth arguably altered the terms and conditions of employment and was an adverse employment action in a Title VII discrimination action); *Torre v. Casio, Inc.*, 42 F.3d at 831 n.7 (allegation of transfer to dead-end job sufficient to create material fact issue of adverse employment action).

The law is clear, that a transfer, even without loss of pay or benefits, may, in some circumstances, constitute an adverse job action. *See Collins v. State of Illinois*, 830 F.2d

at 702-04 & 702 n.7 (collecting cases). But the employee challenging the action must create a material fact issue concerning his transfer and the impact of that transfer. *Torre v. Casio, Inc.*, 42 F.3d at 825. Thus, any cases finding a reassignment is an adverse employment action rely on their own facts. Facts not present in the instant case. In Petitioner's case, he failed to establish the existence of a material fact. Thus, summary judgment was properly granted.

E. The District Court's Decision Is Consistent With This Court's Precedents.

Petitioner argues that the District Court's decision appears to conflict with this Court's decision in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. at 676. However, that case is easily distinguishable on its facts and on the law reviewed. That case addresses different issues from the case at bar. Therefore, Petitioner's reliance on that case is misplaced.

In that case, the Meatcutters' and Butchers' Union sought to prevent any store in the Chicago area from selling meat except during the hours of 9:00 A.M. to 6:00 P.M. *Id.* at 680. All members of a bargaining association of stores acceded to the union's demand except Jewel Tea Co., which held out. *Id.* The union called a strike against it which thereby forced Jewel Tea to acquiesce. *Id.* at 681. On Jewel Tea's suit to void this condition in its contract with the union, the district court held that there was no evidence of a conspiracy between the union and the retailers' association to impose the restricted marketing hours on the company. *Id.* at 682-83.

This Court reviewed two issues, to wit: (1) whether the limitation upon market operating hours are within the labor exemption of the Sherman Antitrust Act; and (2) whether a claimed violation of the Sherman Antitrust Act falls within the regulatory scope of the National Labor Relations Act. *Id.* at 684. In reviewing the terms of the union agreement, this Court reasoned that "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' *about which employers and unions must bargain*" and, thus, within the scope of the National Labor Relations Act. *Id.* at 691 (emphasis added). Although dealing with working hours, the reasoning of the *Local Union No. 189* case is irrelevant to the facts and issues presented in the instant case.

This Court's treatment given to retaliation claims is consistent with the treatment given to the Petitioner's case by the District Court and the Eleventh Circuit. Therefore, there is no conflict between the District Court decision in the instant case and this Court's precedents.

There is no question that Title VII forbids actions taken that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001) (quoting 42 U.S.C. §2000e-2(a)(1)). But Title VII "forbids only behavior so *objectively offensive* as to alter the 'conditions' of the victim's employment". *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (emphasis added); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 752 (1998) (finding that only harassing conduct that is "severe

or pervasive" can produce a "constructive alteration in the terms or conditions of employment"). The District Court reviewed the employment actions using the proper objective standard. [Pet. App. 13-14 citing *Davis v. Town of Lake Park*, 245 F.3d at 1245].

Moreover, the District Court applied the correct standard to determine whether the reassignment constituted an adverse or tangible employment action. [Pet. App. 13-14]. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. at 761 (emphasis added). A tangible employment action in most cases inflicts direct economic harm. *Id.* at 762. The District Court analyzed the evidence presented by Petitioner and properly concluded that the reassignment did not significantly change his responsibilities and did not change his benefits at all. [Pet. App. 12-14].

II.

THIS CASE DOES NOT HAVE FAR-REACHING EMPLOYMENT LAW IMPLICATIONS

Petitioner also argues that the decision in this case presents an issue of national importance that will have a far-reaching impact on decisions interpreting the requirements of Title VII, and other statutes such as the Age Discrimination in Employment Act, 29 U.S.C. §623, Americans with Disabilities Act, 42 U.S.C. §12203, and other statutory causes of action containing an "adverse employment action" requirement. [Petition p. 12].

Petitioner overstates the significance of the ruling in his case with regard to employment law.

This is a case that addresses issues that are important to Petitioner himself. But this Court does not exist for the benefit of particular litigants. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531 (1923).

After considering the facts presented by Petitioner and the applicable case law, the District Court properly held that Petitioner had failed to present sufficient evidence that he was subjected to any adverse employment action in retaliation for protected conduct. This ruling was in accordance with summary judgment case law and employment case law. The courts properly applied the basic summary judgment standard and considered all evidence presented by Petitioner. This case raises no significant issue of employment law that warrants this Court's sound judicial discretionary review.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court deny Petitioner's writ.

Respectfully submitted,

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